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10/697,767	10/30/2003	Andrew Schydlowsky	15651-002001	8887

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EXAMINER	
WEISBERGER, RICHARD C	

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANDREW SCHYDLOWSKY

Appeal 2009-014026
Application 10/697,767
Technology Center 3600

Before: MURRIEL E. CRAWFORD, BIBHU R. MOHANTY, and STEPHEN C. SIU, *Administrative Patent Judges*.

CRAWFORD, *Administrative Patent Judge*.

DECISION ON APPEAL[1]

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[1]The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the "MAIL DATE" (paper delivery mode) or the "NOTIFICATION DATE" (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134 (2002) of the Examiner's final decision rejecting claims 26 to 29, 31, 33, 34, and 46 to 49. We have jurisdiction over the appeal under 35 U.S.C. § 6(b) (2002).

We REVERSE.

Claim 26, with the underlining added, is illustrative:

> 26. A kit for making a nutritional supplement comprising:
>
> a dietary supplement product, wherein the dietary supplement product is a powder comprising one or more of a protein, peptide, amino acid, carbohydrate, electrolyte, herb, or combination thereof; and
>
> at least one additive, wherein the additive is packaged separately from the dietary supplement product.

The Examiner relies on the following evidence:

Morrissette	2002/0150658 A1	Oct. 17, 2002

The Examiner made the following rejections:

1. Claims 26 to 29, 31, 33, 34, and 46 to 49 under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which the Appellant regards as the invention.

2. Claims 26 to 29, 31, 33, 34, and 46 to 49 under 35 U.S.C. § 102(b) as anticipated by Morrissette.

ISSUES

Did the Examiner err in rejecting the appealed claims under 35 U.S.C. § 112, second paragraph because a person of ordinary skill in the art would understand the scope of the term "powder?"

Did the Examiner err in rejecting the appealed claims under 35 U.S.C. § 102(b) because Morrissette does not disclose a powder dietary supplement product?

ANALYSIS

Indefiniteness

The Examiner argues that the term "powder" is a term of degree and there is nothing in the Specification that further defines the powder. The Appellant argues that a person of ordinary skill in the art would understand the scope of the term "powder." We agree. In our view, a person of ordinary skill in the art would understand the ordinary and customary meaning of the term "powder." We note that *Merriam-Webster's Collegiate Dictionary* (11th Ed., Merriam-Webster, Inc. 2004) defines powder as "matter in a finely divided state : particulate matter" (*id.* at 973).

Therefore, we will not sustain this rejection.

Anticipation

The Appellant argues that Morrissette does not disclose a powder dietary supplement. We agree. Morrissette discloses a food product in a package having two compartments or chambers containing food products isolated from each other by a partition or seal which prevents mixing of the contents (para. [0004]). In one embodiment the two food products are milk and ready to eat cereal (para. [0010)]. It is the Examiner's view that the

ready to eat cereal reads on a powder. We do not agree. In our view, a ready to eat cereal is not matter in a finely divided state or particulate matter. In addition, Morrissette does not disclose that the ready to eat cereal therein disclosed is a powder. In addition, although the Examiner may be correct that hot baby cereal may have a powdery form, Morrissette does not disclose hot baby cereal.

In view of the foregoing, we will not sustain the rejection as it is directed to claim 26 and claims 27 to 29, 31, 33, 34, 46 to 49.

DECISION

We reverse the Examiner's § 112, second paragraph and § 102(b) rejections.

REVERSED

hh

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